LING CHEE CHONG & ANOR

v.

EYDEL ABAH & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CIVIL APPEAL NOS: S-02-478-2008 & S-02-480-2008]
22 JULY 2008

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Findings of fact - Whether trial judge failed to appreciate totality of evidence before her - Whether appeal to be allowed*

This appeal turned on the sale of shares in a company called Tunggak Makmur Sdn Bhd by the plaintiffs/respondents shareholders to the defendants/appellants. The facts showed that the plaintiffs alleged that the shares had not been paid for and that being so brought an action to recover the same in the court below. The learned trial judge ruled that doubts arose as to whether or not the shares had been paid for, but that notwithstanding, resolved the doubts in the plaintiffs' favour after applying the *contra preferentum* rule against the payment vouchers and receipts prepared by the defendants (ie. the documents evidencing payment were forgeries). The defendants appealed and argued that the learned judge was wrong in deciding the way she did, and had failed to appreciate the totality of the evidence before coming to her conclusion.

Held (allowing appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It is not in dispute that well before the recovery action came for trial, the defendants had forwarded to the plaintiffs copies of all the relevant payment vouchers and acknowledgements. Between then and the commencement of the trial, none of the plaintiffs however alleged that the documents, which were later produced at the trial, were forgeries. It was only when the defendants gave their evidence that the assertion was made that the vouchers evidencing payment were not signed by

them. Even then, no material was placed before the learned judge suggesting that the signatures on the relevant documents were not those of the plaintiffs. Such being the case, it fell upon the learned judge to have cautioned herself when evaluating the plaintiffs' evidence on the point. She ought to have asked herself whether the assertion of forgery made for the first time from the witness box ought to be given any weight at all. However, nowhere in her judgment is there reference to these matters. Clearly, therefore, there has been no proper evaluation of the evidence on the critical issue of payment. (para 5)

(2) The defendants had produced *prima facie* proof of payment and the evidential burden hence shifted to the plaintiffs to positively prove that the documents evidencing payment were forgeries. On the facts, no evidence was adduced by the plaintiff to disprove the truth of the relevant vouchers and acknowledgements. Consequently, the appeal must succeed. (paras 7 & 8)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan di sini tertumpu kepada penjualan saham sebuah syarikat yang dipanggil Tunggak Makmur Sdn Bhd oleh pemegang-pemegang sahamnya, plaintif/responden di sini, kepada defendan/perayu. Fakta menunjukkan bahawa plaintif mendakwa bahawa defendan gagal membuat pembayaran untuk saham-saham, berakibat mereka memulakan satu tuntutan di mahkamah di bawah bagi mendapatkan kembali saham-saham tersebut. Yang arif hakim merumuskan bahawa terdapat keraguan mengenai pembayaran saham-saham, namun telah memutuskan halperkara dengan berpihak kepada plaintif setelah menggunapakai kaedah *contra preferentum* terhadap baucer-baucer pembayaran dan resit-resit yang disediakan oleh defendan (iatu dokumen-dokumen yang menunjukkan pembayaran telah dipalsukan). Defendan merayu dan berhujah bahawa yang arif hakim khilaf dalam membuat keputusannya, dan telah gagal menilai keseluruhan keterangan yang ada sebelum mencapai keputusannya itu.

Diputuskan (membenar rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Tidak dinafikan bahawa lama sebelum tuntutan pengembalian dibicarakan, defendan telah pun mengemukakan kepada plaintif kesemua salinan baucer-baucer pembayaran dan dokumen-dokumen akuterima yang relevan. Namun, dalam tempoh tersebut, tidak seorang pun dari plaintif mendakwa bahawa dokumen-dokumen berkenaan, yang kemudian dikemukakan di perbicaraan, adalah palsu. Hanyalah setelah defendan memberi keterangan dakwaan dibuat oleh plaintif bahawa baucer-baucer yang membuktikan pembayaran tersebut tidak ditandatangani oleh mereka. Walaupun begitu, tiada keterangan dikemukakan di hadapan yang arif hakim bagi menunjukkan bahawa tandatangan-tandatangan tersebut bukan tandatangan plaintif. Dalam halkeadaan sedemikian, menjadi tanggungjawab yang arif hakim untuk berawas diri apabila menilai keterangan plaintif mengenai persoalan ini. Beliau harus bertanyakan dirinya sama ada dakwaan pemalsuan yang dibuat pertama kalinya dari kandang saksi boleh diberikan sebarang pertimbangan. Bagaimanapun, dalam penghakimannya, tiada apa-apa rujukan dibuat oleh yang arif hakim terhadap persoalan ini. Adalah jelas bahawa tiada penilaian wajar telah dibuat berkaitan isu penting pembayaran ini.

(2) Defendan telah mengemukakan keterangan *prima facie* mengenai pembayaran dan beban dengan itu berpindah kepada plaintif untuk membuktikan secara positif bahawa dokumen-dokumen yang membuktikan pembayaran adalah palsu. Berdasarkan fakta, tiada keterangan dikemukakan oleh plaintif bagi menyangkal kebenaran baucer-baucer dan dokumen-dokumen akuterima berkenaan. Atas alasan-alasan ini, rayuan seharusnyalah berjaya.

Case(s) referred to:
Stoney v. Eastbourne Rural District Council [1927] 1 Ch 367 ***(refd)***

Legislation referred to:
Sale of Goods Act 1957, s. 20

(Civil Appeal No: S-02-478-2008)
For the appellants - Govinda Raj; M/s Raj & Co
For the respondents - D Kalaimany; M/s Sugumar & Co

(Civil Appeal No: S-02-480-2008)

For the appellants - Marina Tiu (Cecil Robertson with her); M/s Yap Chin & Tiu

For the respondents - D Kalaimany; M/s Sugumar & Co

[Appeal from High Court, Tawau; Civil Suit No: T(22) 10-1999]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the Judgment of the Court.

[2] This appeal is directed against the order of the High Court at Kota Kinabalu allowing the respondents' claim against the appellants. The facts which constitute the background to this appeal may be shortly stated.

[3] There is a company called Tunggak Makmur Sdn Bhd. It is the 1st defendant in the court below. The 8 plaintiffs were its shareholders. Each held a different number of shares. They entered into three agreements namely exh. P2 dated 23 July 1994, exh. D3 dated 13 September 1994, and exh. D4 dated 23 September 1994 with the 2nd and 3rd defendants to sell their shares to the latter. The total purchase price was about RM700,000. According to these defendants they paid for the purchase price and then sold the shares to the 4th, 5th and 6th defendants. Later, the plaintiffs brought an action for the recovery of shares on the ground that they had not been paid for. A number of issues were framed by the parties before the learned trial judge. However, only one has survived before us in this appeal as being relevant for its disposal. That issue is whether payment had been made by the 2nd and 3rd defendants to the plaintiffs. If it had been, then that is the end of the question. If not then the sale by these defendants to the 4th, 5th and 6th defendants may, of course, constitute the tort of conversion. We say "may" advisedly because it is settled law that shares in a company are goods and the property in goods in the absence of a contrary intention pass when the contract for sale is made. This is made clear by s. 20 of the Sale of Goods Act 1957. In that event the subsequent sale without making payment to the vendor would not be conversion.

[4] We now turn to address the all important issue, that is to say, whether the learned judge was correct in holding that payment had not been made. This is what she said on that point:

> However, in the 2nd and 3rd Defendants' written submission, a total sum of RM583,740.85 had been paid to the 1st, 2nd, 3rd, 4th and 5th Plaintiffs which contradict the figures shown in the 2nd and 3rd Defendants' payment vouchers and receipts. Besides that, based on the evidence of DW1 at p. 236 Notes of Proceeding, DW1 is claiming that the 2nd and 3rd Defendant had paid to the 1st, 2nd, 3rd, 4th and 5th Plaintiffs a total sum of RM634,239.85 under P2 which also does not tally with the 2nd and 3rd Defendants' own payment vouchers and receipts.
>
> Therefore, as doubt's arise as to the actual purchase price paid under P2, D3 and D4, the doubt should be resolved in favour of the Plaintiffs by virtue of the contra preferentum rule as P2, D3 and D4 and the payment vouchers and receipts and letters of confirming receipt of full payment were prepared by DW1 and DW2.
>
> In the light of the aforesaid, I can say that the 2nd and 3rd Defendants have failed to discharge their burden on this issue. Therefore, I hereby conclude that the answer to this issue (3) must be in the Negative ie, that the 2nd and 3rd Defendants fail to pay the purchase price fully in accordance with Agreements P2, D3 and D4 to the 1st, 2nd 3rd, 4th, 5th and 8th Plaintiffs.

[5] The primary complaint of the defendants before us is that the learned judge failed to judicially appreciate the totality of the evidence when arriving at her conclusion. Now, it is not in dispute that well before the action came on for trial advocates for the defendants forwarded to the advocates of the plaintiffs copies of all the relevant payment vouchers and acknowledgements when making disclosure of their clients' case. Between then and the commencement of the trial none of the plaintiffs alleged that these documents, which were later produced as exhibits at the trial, were forgeries. It was only when the plaintiffs gave their evidence that the assertion was made that the vouchers evidencing payment were not signed by them. But the matter was pursued no further. No material was placed before the learned judge, for example by way of a document examiners report, suggesting that the signatures on the relevant documents were not those of the plaintiffs. In this state of affairs the learned judge ought to have cautioned herself when evaluating the plaintiffs' evidence on the

point. She ought to have asked herself whether the assertion of forgery made for the first time from the witness box ought to be given any weight at all. However nowhere in her judgment is there reference to these matters. Indeed, careful reading of her judgment reveals that there has been no proper evaluation of the evidence on the critical issue of payment.

[6] Now it is true that as a general rule this court will not interfere with findings of fact made by a trial court having audio-visual advantage. But it is equally well settled that appellate intervention will take place where the trial court has failed to judicially appreciate the evidence led before it. This is such a case. The defendants have clearly demonstrated that the learned judge failed to properly appreciate the evidential material placed before her.

[7] In supporting the learned judge's judgment, counsel for the plaintiffs has argued that the burden lay on the defendants to prove that payment had been made and not on the plaintiffs to proof the negative. That is quite correct. But in this case, the defendants produced *prima facie* proof of payment. The evidential burden then shifted to the plaintiffs to positively prove that the documents evidencing the payment were forgeries. Difficulty has arisen in this case by reason of the plaintiffs' failure to appreciate the difference between the legal burden and the tactical or evidential onus in this case. Evidentially speaking, the plaintiffs had to merely assert that they had not received payment. It then fell on the defendants to prove that payment was in fact made. Once they produced documents evidencing payment the evidential or tactical onus then shifted to the plaintiffs to call positive evidence to prove that the document in question were forgeries. The point we seek to make is well brought out in the following passage in the judgment of Lord Hanworth MR in *Stoney v. Eastbourne Rural District Council* [1927] 1 Ch 367, 397:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence.

In the present case there was indeed no other evidence going to disprove the truth of the relevant vouchers and acknowledgements.

[8] For the reason already given, this appeal must succeed. It is allowed. The orders of the High Court are set aside. There shall be judgment for the 4th, 5th and 6th defendants on their counterclaim. The plaintiff's claim is dismissed and they must pay the costs of this appeal and those incurred in the court below. The deposits in court shall be refunded to the respective appellants. A word though about costs in this court. Really speaking there was only one argument that was addressed to us. It was by Mr. Govinda Raj for the 2nd and 3rd defendants. Nothing substantive was added by the learned counsel for other defendants. Accordingly we would direct the taxing registrar of this court to disallow any item of getting up in the bill of the 1st, 4th, 5th and 6th defendants. However, these defendants shall be entitled to their out of pocket and profit costs. The parties shall be generally at liberty to apply to the High Court.